Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 257 Proceeding to	)	
Identify and Eliminate	)	GN Docket No. 96-113
Market Entry Barriers	)	
for Small Businesses	)	

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its reply comments in response to the Commission's Notice of Inquiry ("Notice") in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The Notice in this proceeding seeks information necessary to fulfill the Commission's obligations under Section 257 of the Communications Act of 1934, as added by the Telecommunications Act of 1996.[1] That provision charges the FCC with the task of identifying and eliminating market entry barriers that deter the formation and expansion of small telecommunications businesses.

In our initial comments, we urged the Commission to remove those barriers that most hinder the ability of small cable and other potential new entrants to expand into the markets for telecommunications and information services. NCTA urged the Commission to take reasonable actions to ameliorate the difficulties encountered by small companies in raising capital and in

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

dealing with legal and regulatory provisions which limit the ability of small companies to challenge incumbents in the provision of telecommunications and information services. Other parties discussed actions the Commission could take to revise its own procedures which serve as barriers to entry.[2] These proposals too warrant Commission consideration. Unfortunately not all parties addressed funding or governmental barriers to entry. Rather, at least one party, OpTel, Inc.,[3] has used this proceeding, as it has used others, to seek abrogation of private contractual arrangements in order to obtain a competitive advantage over franchised cable operators. As discussed below, OpTel's proposal proceeds from faulty factual and legal premises and should not be considered in this proceeding.

OpTel is concerned about exclusive contracts between a cable operator (but not any other Multichannel Video Programming Distributor ("MVPD")) and a multiple dwelling unit ("MDU"). OpTel urges that such contracts be subjected to the "fresh look" doctrine, which has occasionally been applied in common carrier regulation when changed regulatory circumstances affect a particular market.[4] OpTel has recently made this same proposal in at least two other Commission proceedings -- in comments on the Third Annual Report to Congress on the status of competition in the multichannel video programming marketplace (CS Docket No. 96-133) and in MM Docket No. 92-260 and CS Docket No. 95-184, dealing with cable home wiring and inside wiring.

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2 See Comments of the Cable Telecommunications Association, GS Docket No. 96-113, filed August 23, 1996.

3 Comments of OpTel, Inc., GN Docket No. 96-113, filed September 27. 1996 ("OpTel Comments").

4 OpTel Comments at 5-9.

OpTel's argument is premised on a false assumption that cable agreements with MDUs are the result of monopoly, take-it-or leave it negotiations while SMATV (and other MVPD) agreements with MDUs are not. But there is no proof that exclusive cable agreements are the result of any different process than the other MVPD agreements in existence today. OpTel's attempt to label cable's contracts as "perpetual" do nothing to change the fact that those agreements were, and are, proper, privately-negotiated, exclusivity agreements of the same type that OpTel endorses. As has been pointed out elsewhere, "[c]ontrary to OpTel's assertions, there is no such thing as a perpetual MDU contract. As with all contracts, the term of a cable operator-MDU service agreement is the product of open negotiations between the parties."[5]

In fact, the contracts OpTel complains about are no different from those it enters into with MDUs in the open market. As OpTel concedes, the "economics of the MDU marketplace favor the use of exclusive service agreements."[6] OpTel concludes that "exclusive access agreements are the norm at MDUs, both for franchised cable operators and private cable operators."[7] Indeed, the SMATV industry has existed at least since the 1980s, when OpTel claims that many of the so-called "perpetual" agreements were signed.[8] This demonstrates that MDUs have had a choice in video providers and no changed circumstances justify application of the "fresh look" doctrine here.

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5 Reply Comments of Tele-Communications, Inc., CS Docket No. 96-133, filed August 19, 1996 at 14 ("TCI Reply Comments").

6 OpTel Comments at 4.

7 Id.

8 Id. at 5.

In any event, the "fresh look" doctrine has been applied primarily, if not exclusively, in common carrier regulatory environments where an area previously subject to monopoly is suddenly opened to competition or is the subject of significant changed circumstances. As a result, parties were permitted to give existing long-term contracts -- which had been rendered illegal, unreasonable or unfair due to the change in policy -- a "fresh look." This was the case where the 800 number market -- which previously had been the sole province of AT&T because of the lack of 800 number portability requirements -- was made subject to number portability requirements. As a result, the Commission thought it fair to give customers with long-term AT&T 800 number contracts a "fresh look" to determine if they wanted to keep those contracts or switch to another 800-number provider.[9]

No similar circumstances warrant application of the policy to non-common carrier contracts such as OpTel proposes. Indeed, the MDU market is the subject of vigorous competition among MVPDs -- MMDS, SMATV and recently DBS providers as well as franchised cable operators. Congress and the Commission have recognized this fact by reducing the burdens on cable provision of service to MDUs. OpTel's proposal to increase those burdens flies in the face of those recent actions.[10]

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[9] Competition in the Interexchange Marketplace, 7 FCC Rcd 2677, 2678 (1992).

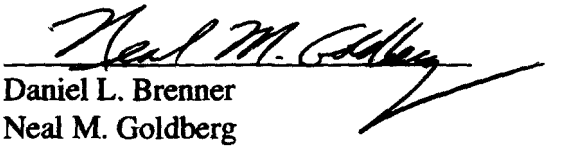
[10] See 47 U.S.C. § 543(d), amended by section 301 (b)(2) of the 1996 Act (permitting greater cable operator pricing flexibility in MDUs to meet lower prices offered by competitors). See, also, H.R. Rep. No. 204, 104th Cong., 1st Sess. 109 (1995) (recognizing that discounted offerings to MDUs by cable operators is necessary due to the presence of other providers offering the same service); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Third Order on Reconsideration, 9 FCC Rcd. 4316, 4326 (1995) (noting that competitors in the MDU market have become "important footholds for the establishment of competition to incumbent cable systems").

Finally, the contracts which are the subject of the OpTel comments are hardly the type of market entry barrier contemplated by Section 257. They do not reflect legal or regulatory barriers nor do they result from disparities in the ability to raise capital. Rather, they are the result of arms-length, privately-negotiated agreements which are equally available to franchised cable operators and other MVPDs. At a minimum, adoption of OpTel's proposal -- which would result in the abrogation of private contracts -- would raise significant "takings" concerns. As others have said, "[i]n essence, OpTel is asking the Commission to abandon reliance on market forces and delay service to subscribers for OpTel's benefit."[11]

CONCLUSION

For the foregoing reasons, NCTA respectfully urges the Commission to reject the OpTel proposal.

Respectfully submitted,



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[11] TCI Reply Comments at 16.